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**Tri County Building Supplies, Inc. and Teamsters  
Union Local 331, a/w International Brotherhood  
of Teamsters, AFL-CIO. Case 4-CA-29386**

August 8, 2000

**DECISION AND ORDER**

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND  
HURTGEN

Pursuant to a charge filed on May 5, 2000, the General Counsel of the National Labor Relations Board issued a complaint on May 19, 2000, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Cases 4-RC-19473, 4-RC-19474, and 4-RC-19475. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On June 22, 2000, the General Counsel filed a Motion for Summary Judgment. On June 30, 2000, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent did not file a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

**Ruling on Motion for Summary Judgment**

In its answer the Respondent admits its refusal to bargain, but attacks the validity of the certification on the basis of the Board's unit determination in the representation proceeding. Specifically, the Respondent renews its contention, raised and rejected in the underlying representation proceeding, that the certified unit of employees at its Stites Avenue facility in Cape May Court House, New Jersey, is inappropriate, and that the only appropriate unit consists of a multifacility unit encompassing all of the Respondent's sites or, alternatively, a unit consisting of the Respondent's two facilities in Cape May Court House—Stites Avenue and Reading Avenue.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We

therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding.<sup>1</sup> See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.<sup>2</sup>

On the entire record, the Board makes the following

**FINDINGS OF FACT**

**I. JURISDICTION**

At all material times, the Respondent, a New Jersey corporation, with a number of facilities in the State of New Jersey, including a facility on Stites Avenue, Cape May Court House, New Jersey, has been engaged in the wholesale and retail sale of building supplies. During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its business operations described above, received gross revenues in excess of \$500,000 and purchased and received at its New Jersey facilities goods valued in excess of \$50,000 directly from points outside the State of New Jersey. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.<sup>3</sup>

<sup>1</sup> In its answer, the Respondent states that it "is without sufficient information and/or knowledge to admit or deny" the allegations of the complaint concerning the filing and the service of the charge. Under Sec. 102.20 of the Board's Rules, such a statement operates as a denial.

The General Counsel has attached documents to his Motion for Summary Judgment which establish that the charge was filed on May 5, 2000, and served on May 9, 2000. The Respondent has not contested the authenticity of these documents. Accordingly, we find that the Respondent's denial raises no material issue of fact warranting a hearing.

In lieu of a response to the Notice to Show Cause, the Respondent filed a letter stating that it "has decided that it will engage in good faith bargaining" with the certified Union. The Respondent's representation that it will bargain with the Union does not raise any material issues of fact, but rather is a matter to be considered at the compliance stage of this proceeding.

<sup>2</sup> In the underlying representation proceeding, Member Hurtgen dissented from the Board's finding that a unit limited to the Stites Avenue facility is appropriate for purposes of collective bargaining, and he remains of that view. However, he agrees that the Respondent has not raised any new matters that are properly litigable in this unfair labor practice case. See *Pittsburgh Plate Glass v. NLRB*, 313 U.S. 144, 162 (1941). In light of this, and for institutional reasons, he agrees with the decision to grant the General Counsel's Motion for Summary Judgment.

<sup>3</sup> The Respondent's answer states that it "is without sufficient information and/or knowledge to admit or deny" the complaint allegation that the Union is a labor organization within the meaning of Sec. 2(5) of the Act. The Respondent, however, stipulated to the Union's labor organization status in the underlying representation proceeding, and it is therefore precluded from litigating the matter in this proceeding. *Biewer Wisconsin Sawmill*, 306 NLRB 732 fn. 1 (1992).

## II. ALLEGED UNFAIR LABOR PRACTICES

### A. *The Certification*

Following the election held October 16, 1998, the Union was certified on October 26, 1999, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time truckdrivers, yard workers, forklift operators, equipment operators, laborers, warehouse workers, warehouse leadperson, checkers, and counter staff employed by the Employer at its Stites Avenue, Cape May Court House, New Jersey facility, excluding clerical employees, purchasing employees, estimators, Branch Manager, Assistant Manager, Yard Leadperson, outside salespersons, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

### B. *Refusal to Bargain*

Since December 14, 1999, the Union has requested the Respondent to bargain, and, since December 14, 1999, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

### CONCLUSION OF LAW

By refusing on and after December 14, 1999, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

### REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

### ORDER

The National Labor Relations Board orders that the Respondent, Tri County Building Supplies, Inc., Cape May Court House, New Jersey, its officers, agents, successors, and assigns, shall

#### 1. Cease and desist from

(a) Refusing to bargain with Teamsters Union Local 331, a/w International Brotherhood of Teamsters, AFL-CIO as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time truckdrivers, yard workers, forklift operators, equipment operators, laborers, warehouse workers, warehouse leadperson, checkers, and counter staff employed by the Employer at its Stites Avenue, Cape May Court House, New Jersey facility, excluding clerical employees, purchasing employees, estimators, Branch Manager, Assistant Manager, Yard Leadperson, outside salespersons, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility on Stites Avenue, Cape May Court House, New Jersey, copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 4 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 14, 1999.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

<sup>4</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. August 8, 2000

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John C. Truesdale, Chairman

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Wilma B. Liebman, Member

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Peter J. Hurtgen, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Teamsters Union Local 331, a/w International Brotherhood of Teamsters,

AFL-CIO as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time truckdrivers, yard workers, forklift operators, equipment operators, laborers, warehouse workers, warehouse leadperson, checkers, and counterstaff employed by us at our Stites Avenue, Cape May Court House, New Jersey facility, excluding clerical employees, purchasing employees, estimators, Branch Manager, Assistant Manager, Yard Leadperson, outside salespersons, guards and supervisors as defined in the Act.

TRI COUNTY BUILDING SUPPLIES, INC.